There is very little authority on this question and the only case cited to me was the Singapore case of *Lian Teck Chew v. Kiew Leng & Co.*[1] decided in March, 1952 upon the provisions of the Singapore Control of Rent Ordinance, 1947. In that case the rent of the whole of certain premises had been fixed in 1946 at $150 per month and in 1949 the applicant became the tenant of the first floor only at $250 per month. Upon his application to reduce the rent the Rent Control Board reluctantly concluded that it could not reduce the applicant's rent because $250 was the standard rent under the definition contained in the Ordinance. The matter having come before the High Court the learned Judge expressed the opinion that there could not be two standard rents, one of which, for only a part of the building, was far greater than that for the whole building and he remitted the case to the Board for a lower rent to be assessed.

Mr. Abdoolcader for the plaintiff sought to distinguish the Singapore case from the case now before me on two main grounds. In the first place he pointed out that the Singapore Ordinance of 1947 upon which that case was decided is not entirely the same as our Ordinance of 1948. In particular the reference in the judgment to that part of the Singapore Ordinance which refers to substantial justice being done does not appear in our Ordinance. Secondly, in the Singapore case the rent of the whole premises had been fixed by the Board whereas in the present case no part of the rent has at any time been fixed by the Board. It was also pointed out that there is nothing in the report of the Singapore case to indicate that the attention of the learned Judge was particularly called to the definition of "premises" which in the Singapore Ordinance of 1947 is substantially the same as the definition of "premises" which I have set out earlier in this judgment.

There is a further point to be observed in regard to the Singapore decision referred to. The Board in that case clearly came to its decision on the basis that it had no power to alter a standard rent; and the case appears to have been argued before the High Court on the assumption that this was correct. I should have thought, however, that under the provisions of section 8(1)(b) of our Ordinance (which is word for word the same as section 9(1)(b) of the Singapore Ordinance of 1947) the Board could have reduced the rent of the relevant portion of the premises notwithstanding that the rent being charged at the time was the standard rent. The wording of this paragraph appears to me to be very clear. It reads as follows:—

> "8(1) The Board shall have and may exercise the following powers, namely —
>
> (b) to make orders fixing such rent at a figure equal to, below or above the current rent as to the Board may seem just and proper; and, from time to time, to review, vary or set aside any order made by it, as provided in section 9 of this Ordinance."

These are very wide words and appear to me to give to the Board the fullest possible discretion to fix whatever rent may be just in all the circumstances; and I see no reason to place any limitation on these words in respect of those cases where the current rent happens to be the same as the standard rent. I am confirmed in this view by the wording of section 3(1) which makes the rent fixed by the Board the primary measure of the permissible rent; it is only if the Board has not fixed the rent that the standard rent comes into the picture at all. I do not have to decide this point but it seems to me that had it been taken before the learned Judge in the case now under discussion his decision, though no doubt it would have been in the result the same, might have rested on different grounds.

In view of the distinctions and considerations above mentioned I do not think that the case now before me is quite on all fours with the Singapore case which I, therefore, do not feel bound in this case to follow.

My conclusion is that from the wording of the definition of "premises" contained in the Control of Rent Ordinance, 1948 it is impossible to avoid the conclusion that there may in certain circumstances be two standard rents. I cannot, therefore, avoid the further conclusion that the standard rents of these "premises" — that is to say, the three separate parts of the house let to the three defendants — were $50, $20 and $20 per month respectively and that the landlord having stepped into the shoes of the principal tenant was entitled to collect rents at these rates until they were altered by the Board.

For these reasons there will be judgment for the plaintiff for the amount claimed. I will hear argument as to costs.

Judgment for the plaintiff.

Solicitor for the plaintiff: *Ong Huck Lim.*
Solicitor for the defendants: *Lim Kheng Kooi.*

NIPPON YUSEN KAISHA v. W. A. BALCH.

[C. A. (Mathew, C.J. (F.M.) Whitton and Buttrose, JJ.) December 16, 1953]

[Singapore — Civil Appeal No. 24 of 1953]

Negligence — Doctrine of common employment.

This was an appeal against the judgment of Brown, J. reported in (1953) M.L.J. 184. The facts of the case are fully stated in the judgment of the learned trial Judge.

The Court of Appeal agreed with the finding of the learned trial Judge on the question of negligence on the part of the crew but disagreed on the question of common employment and held that the doctrine of common employment applied in this case and that the pilot was engaged in common work under a contract of service.

[Editorial Note : — In the Colony of Singapore the doctrine of common employment is abolished by section 5 of the Contributory Negligence and Personal Injuries Ordinance, 1953. This Ordinance came into force on 1st March, 1954. In the Federation of Malaya the law remains unchanged. We understand that leave to appeal has been granted to appeal to the Privy Council.]

Cases referred to:—

(1) *Sharp v. S. R.* (1925) 2 K.B. 311.
(2) *Kerry v. Keightley El. Co.* (1940) 3 All E.R. 399.
(3) *London Graving Dock Co. Ltd. v. Horton* (1951) A.C. 737.
(4) *Lucy v. Bawden* (1914) 2 K.B. 318.
(5) *Bartonshill Coal Co. v. Reid* (1858) 3 Macq. 266 at 295.
(6) *Alexander v. Tredegar Iron & Coal Co. Ltd.* (1944) K.B. 330.
(7) *Radcliffe v. Ribble Motor Services Ltd.* (1939) A.C. 215.
(8) *Tozeland v. West Ham Union* (1906) 1 K.B. 538.
(9) *Smith v. Steele* 10 Q.B. 125.
(10) *Barrington v. Kent Rivers Catchment Board* (1947) 2 All E.R. 782.
(11) *Alexander & Anor. v. Tredegar Iron & Coal Co. Ltd.* (1945) A.C. 286.
(12) *Powell v. Docks & Inland Waterways Executive* (1950) 83 Ll. List L.R. 107.
(13) *Indermaur v. Dames* 1 C.P. 274.
(14) *Kelley v. Shamrock Shipping Co. Ltd.* (1933) 47 Ll. List L.R. 33.
(15) *Clark (or Thom) v. J. & P. Hutchingson Ltd.* (1925) 21 Ll. List L.R. ; (1925) S.C. 386.
(16) *Kelly v. Spenser* (1949) S.C. 143.
(17) *Workington Harbour & Dock Board v. Towerfield* (1951) A.C. 112.

CIVIL APPEAL.

K. Gould for the appellants.

Dr. C. H. Withers-Payne for the respondent.

Cur. Adv. Vult.

Mathew, C.J. : — The respondent in this case is a licensed pilot, and a member of the Singapore Pilots Association. On 11th July, 1952, in accordance with instructions from his Association he went to the appellants' vessel, the "Mantetsu Maru", for the purpose of piloting the ship out of Singapore harbour. The gangway was against the ship and the respondent mounted it. The gangway then collapsed, and as a result the respondent sustained injuries for which he has claimed damages.

The learned trial judge was satisfied on the evidence that :—

(a) the gangway was in a position which "invited" the respondent to go up;

(b) the gangway was in an unsafe condition to be mounted;

(c) no warning was given to the respondent;

(d) the respondent was not guilty of contributory negligence.

The main argument of the appellants on these findings of facts was directed to establishing that the respondent, as a master-mariner, could not have failed to see that the gangway was in the course of being lowered and was therefore unsafe, and that the failure to notice what was happening constituted contributory negligence on his part.

Mr. Gould cited a number of cases in support of this argument.

Sharp v. S. R.[1] where a passenger, who stepped out of a train which had been halted away from the platform and sustained injuries, failed to recover damages, as he had stepped out, without looking, on the assumption that the train was by a platform.

Kerry v. Keightley El. Co.[2], where a person who stepped backwards into a lift without having first looked to see if the lift was there, failed to recover damages for the injuries he sustained in falling down the lift shaft, on the ground that he had no right to assume that if a lift door opened the lift was necessarily there.

London Graving Dock Co., Ltd. v. Horton[3], where a welder failed to recover damages for injuries sustained when he had full knowledge of the risk, and

Lucy v. Bawden[4], where it was laid down that the only duty of an invitor is not to expose an invitee to unexpected risks.

None of these authorities are, in my view, applicable to the facts of this case. A gangway against a ship is a clear invitation to a person who is expected on a ship to mount it, and the more so when there are a number of members of the ship's company standing at the head of the gangway who give no indication that the gangway is insecure and should not be mounted.

I can see no reason for disagreeing with the learned trial judge's findings and conclusions on this part of the appeal.

I now come to the most difficult question in this appeal, the defence of common employment. It is a melancholy thought that our decision has to be given on the eve of the abolition by the Legislature of the Colony of the doctrine of common employment.

The scope of the doctrine of common employment is very conveniently summarised in *Salmond on the*

Law of Torts (10th ed.) page 100, in the following passage :—

"'When several workmen,' said Lord Cranworth (in **Bartonshill Coal Co. v. Reid**[5], *engage to serve a master* in a common work, they know or ought to know the risks to which they are exposing themselves, including the risks of carelessness, against which their employer cannot secure them, and they must be supposed to contract with reference to such risks.' Though this supposition is nowadays a sheer fiction, it is now accepted as the true basis of the rule and it is a fundamental principle that there must be a contract, express or implied, between the employer and employee so that it may be possible to imply the term from the nature and circumstances of the contract. Where there is no contract e.g. where a workhouse inmate is ordered to do work or a pilot is employed under compulsion of law, it has been held that there is no basis on which to found the implied term; on the other hand in **Alexander v. Tredegar Iron & Coal Co., Ltd.**[6], it was held by the Court of Appeal that where a workman is retained in or directed to his employment by the Minister of Labour under the Essential Work Order, even if it be against his will, the doctrine applies, though there is in such a case no freedom of contract between master and servant."

In his speech in *Radcliffe v. Ribble Motor Services Ltd.*[7], Lord Wright emphasised (at p. 247) :—

".....the fundamental principle that there must be an actual contract between the employer and employee so that it may be possible from the nature and circumstances of that contract to imply, though by a fiction of law, that the employee undertook the particular risks of the negligence of his fellow employees. On this footing it has been held that where there was no contract at all, as in the case of a workhouse inmate doing work which he was ordered to do (**Tozeland v. West Ham Union**[8]), or a pilot employed under compulsion of law (**Smith v. Steele**[9]) there is no basis of actual contract on which to found the implied term."

The learned trial judge rejected the defence of common employment basing his decision on *Smith v. Steele*[9], *supra*, and held following the decision in *Barrington v. Kent Rivers Catchment Board*[10], that the respondent pilot was employed in a different department and on dissimilar work from the members of the crew whose negligence had caused his injuries. He held further that the respondent (pilot) was an independent contractor.

Mr. Gould (for the appellants) has cited a number of cases decided under certain war-time statutory orders which concerned the direction of labour, and they are, in my view, relevant to the case when considering the true effect of *Smith v. Steele*[9], *supra*. The only case which reached the House of Lords was *Alexander & Anor. v. Tredegar Iron & Coal Co. Ltd.*[11]. This decision is of no great assistance in deciding the present case, as the only point which the House of Lords decided was that the doctrine of common employment is not essentially based on the continuing freedom of the workman to leave the employment and despite the restrictions imposed by the Essential Work (Coalmining Industry) (No. 3) Order, 1941, it constituted a good defence for the employers. The question, whether the doctrine of common employment applies to the case of workmen involuntarily directed into a particular employment by virtue of the order, was left open.

In *Powell v. Docks & Inland Waterways Executive*[12], it was held that a stevedore who had been directed did not exclude the normal relationship of master and servant and that the negligence of the railway company's servants was the negligence of persons employed in common work with the plaintiff, and that therefore the defendant's plea of common employment must be upheld.

The most important point which concerns us in the present case, namely the effect of compulsion on the employed, was fully considered in the above case. I think the following passage from the judgment of Singleton, J. sets out very clearly the manner in which the principal argument for the respondent should be approached :—

"There was no doubt in the opinion of the House of Lords that the judgment of the Court of Appeal was right, in as far as necessary for the purposes of that case; but Viscount Maugham, in the course of his speech, sup., at p. 296, said:

My Lords, I have already noted that in the present cases the workmen, so far from being directed to the particular employment in which they were engaged at the date of the accident, had been in the service of the respondents for many years before the Essential Work Order came into force. It is only with those facts that we are dealing. I do not think it would be prudent for this House to express an opinion on the very important question whether the result would be the same in the case of workmen who were directed to an employment under the Essential Work Order. In such a state of facts the contract of employment would not be voluntary on the part of the workmen and an argument to exclude or modify the usual rule might take a very different form from that which Mr. Paull had felt himself able to adopt on the present appeal. I do not propose to express my view one way or the other as to the result of an appeal if such a case were to come before the House.

I confess that when these words were read earlier in this case I was very impressed by the sentence: 'In such a state of facts the contract of employment would not be voluntary on the part of the workman.' So, too, did I think that very great importance was to be attached to the words of Lord Wright in the same case, at the bottom of p. 299 and at the top of p. 300:

It is no doubt true that the doctrine is based on this freedom of choice (see, for instance, **Smith v. Steele**[9], and **Radcliffe v. Ribble Motor Services Ltd.**[7]), but that looks to the date when the contract is entered into. It has never been suggested that such a change as is effected by the Essential Work Order can have been in the contemplation of the parties.

The implied term which the law has accepted is indeed theoretical and has little relation to fact, but I am not prepared to extend the theory of fiction beyond its present artificial and arbitrary limits. The new proviso which it is sought to introduce is too far removed from any conceivable contemplation of the parties. There is no authority for it. I agree with all the judges below that no reason is shown why the plea of common employment should not succeed.

And, although I do not read them, because they have been read several times, I draw attention to the words of Lord Simonds in the same case at the bottom of p. 302 and at the top of p. 303.

Mr. Justice Pritchard, in dealing with this matter, realized, of course, that the House of Lords had left open the question to be decided in this case, and that

he had before him really only the views of the present Lord Chief Justice and Lord Justice du Parc as expressed in the Court of Appeal in Alexander's case supra. He thought it right to follow that case, and, accordingly, he held that the doctrine of common employment was an answer to the plaintiff's claim.

I also think that it is. It would not help anyone if I said that I had come to that conclusion with a certain amount of regret. But the way I look upon the matter is this. Dock labourers year after year have been working upon the same system. This dock-labourer, had it not been for the Order and the Scheme, would quite clearly have been in the employment of the railway company. As I have said, I do not think that the result of the Order or of the Scheme is to alter his employment.

Then it is said 'In any event, he was not a free agent; so you cannot imply a term.' One asks oneself at once: why not? What has there been effected by the Order or by the Scheme which would alter the whole basis of the service of dock labourers? I find that question difficult to answer. I appreciate that the defence of common employment only arises out of an implied term in a contract, and I appreciate the difficulty of implying a term if there is no contract; but in cases of this kind there has been a contract, I was going to say, through the ages, and I cannot see that that position has really been altered. I think that that submission of Mr. Charlesworth fails."

Dr. Withers-Payne has argued that if there is compulsion on the pilot, and this compulsion is to be found in section 396 of the Merchant Shipping Ordinance, there can be no contract of service on which the implied term can be based. I do not think that this construction can be put on the decision in *Smith v. Steele*[9], *supra*. The head-note reads :—

"Negligence—Master & Servant—compulsory pilotage — injury to pilot.

There is no implied contract between the owners of a ship and a pilot whom they are compelled to employ, that the pilot shall take upon himself the risk of injury from the negligence of the shipowners' servants; and an action will lie by the pilot against the shipowners for injuries, caused to him, whilst acting as pilot on board their vessel, by the negligence of their servants."

In the judgment of Blackburn, J. the following passage occurs :—

"We think, therefore, that the question in the present case is reduced to this, whether there is between the owners of a ship and the pilot whom they are compelled to employ an implied contract that the pilot shall take upon himself the risk of injury from the negligence of the shipowners' servants. **Indermaur v. Dames**[13] decides that there is no such implied contract between the owner of machinery and those who are sent by their masters to repair it. And we think that there is no such implied contract in the case of a pilot. The law as to pilots is now regulated by the Merchant Shipping Acts. The pilot is by 17 & 18 Vict. c. 104 section 365, subject to a penalty if he refuses to take charge of the ship. The master is, by section 353, bound under a penalty to employ the pilot. The rate of remuneration is by section 358, neither to be more nor less than the fixed rate, though both parties should agree. And by section 388 the owner is not to be liable for the pilot as his servant. By a subsequent enactment, 35 & 36 Vict. c. 73, section 9, power is given by bye-laws to modify section 358 so far as to allow any pilot or class of pilots any rate less than the rate for the time being demandable by law; but no power is given to enable a pilot to demand more. He cannot, therefore, make any special bargain to receive larger pay in consideration of his taking this risk upon him. An ordinary servant has, as Lord Cairns points out (at least theoretically) the power of choosing whether he will enter into the employment of a master who does not agree to act personally in the management of his business, or as an alternative to be responsible for the negligence of those he employs. The pilot has no such choice; he must conduct the ship on the terms fixed by the statutes which regulate pilotage; and we can find nothing in those statutes to justify the conclusion that the pilot is to take upon himself the risk."

In my view, the basis of this decision is that there can be no contract of service between the owner of a ship which is compelled to take a pilot on board and a pilot who has no freedom of choice as to the ship he will pilot. There being no contract of service there is no contract in which a term can be implied that the pilot shall take upon himself the risk of an injury from the negligence of the shipowners' servants. In the present case the respondent is a member of the Pilots Association and on request went to pilot the appellants' ship. In my view there is clearly a contract of service and, on the authorities quoted to us and in particular *Powell v. Docks & Inland Waterways Executive*[12], *supra* I do not think that the pilot's liability to penalties, if he refuses for no good cause to pilot a ship, has the effect of excluding from his contract of service the implied condition that he accepts the risks of his fellow servants' carelessness.

The remaining question is whether a pilot of a ship is undertaking a common work with the crew of a ship. Scrutton, L.J. states in the course of his judgment in *Kelley v. Shamrock Shipping Co. Ltd.*[14] that :—

"There is a series of cases which determine that a pilot is in common employment with the crew of a ship"

but research on the part of Counsel engaged in this case has not succeeded in un-earthing the series of cases referred to by the learned Lord Justice.

In *Clark (or Thom) v. J. & P. Hutchingson Ltd.*[15], the Lord President said in the course of his judgment :—

"Difficult as it undoubtedly was to define with precision the exact legal conditions under which a licensed pilot performed his duties, it was impossible, he thought, to conceive of him in relation to those duties as other than a constituent member for the time being of the organisation composed of the officers and the crew."

In my view, it would be difficult to come to any other conclusion than that the pilot was engaged in common work with all the other members of the ship's company.

I am satisfied that the appellants have established their defence of common employment, and in consequence this appeal must be allowed. It is unfortunate that the authorities which have been cited to us and on which our judgments are founded were not available in full to the learned trial judge.

I would order that the deposit be paid to the appellants, but before making an order as to costs I would like to hear Counsel.

Buttrose, J. :—The respondent, Mr. Walter Allen Balch, who was a licensed pilot and a member of the Singapore Pilots Association was injured on July 11th 1952 as the result of an accident which occurred while he was mounting the gangway in order to board the appellants' vessel "Mantetsu Maru" for the purposes of pilotage. As the respondent was mounting the gangway it fell to the ground with the respondent on it and he suffered the injuries in respect of which he has claimed damages. The bottom of the gangway was resting on the wharf and the top was resting on the bulwark ostensibly in a position to be used.

It appeared however that in fact the gangway was not in that position for the purpose of receiving either the pilot or anyone else but was about to be lowered to the wharf—the gangway being the property of the Singapore Harbour Board.

This appeal raised three issues :—

1. Were the crew of the "Mantetsu Maru" negligent in not warning the respondent that they were in the process of unshipping the gangway?

2. Was the respondent negligent in not seeing it for himself and in mounting the gangway without first seeing whether it was safe to do so? In other words did he use reasonable care for his own safety? and

3. If the appellants were negligent and the respondent was not, was he in common employment with the crew?

With regard to the first two issues the learned trial Judge found the following facts :—

(a) the gangway was in an unsafe condition owing to the lashing ropes having been unfastened;

(b) no effective warning was given to the respondent;

(c) in failing to give the respondent warning at a time when the gangway was not properly secured (the lashing ropes not being fastened) the appellants' servants were guilty of negligence.

(d) the respondent showed no lack of reasonable care in failing to see that the lashing ropes were not fastened or that the gangway was not properly secured.

The respondent's claim was on the basis of invitor and invitee and the evidence, in my view, clearly established that the respondent was an invitee.

I have carefully considered the authorities to which Mr. Gould has invited our attention including those which show that the occupational experience of an invitee is relevant in considering whether he used reasonable care for his own safety.

It will be sufficient if I say that in my opinion there was ample evidence to support the findings of fact of the learned trial Judge and I can see no reason for disturbing them.

That would be sufficient to dispose of this appeal in the respondent's favour were it not for the third and more difficult issue of "common employment" which remains to be decided. Now the appellants by an amendment to their pleadings which was allowed on the first day of the trial raised the defence of common employment. This doctrine of common employment although it was abolished in England by the Law Reform (Personal Injuries) Act, 1948, is still the law in the Colony. The basis of the doctrine depends upon an implied term in the contract of service whereby the servant undertakes the risk of negligence on the part of his fellow servants. The learned trial Judge apparently took the view that the respondent was not a servant of the shipping company—the appellants—but was an independent contractor.

With that view I am unable to agree. I think that the authorities have clearly established that a pilot is the servant of the shipowner, just as much as are the Captain and the crew.

It is I think well established that a pilot voluntarily employed is the servant of the shipowner who consequently is liable for the negligent acts of the pilot.

For the appellants it was contended that there is no such thing as compulsory pilotage in Singapore and that the respondent was not in this case employed under compulsion of law. There was no legal requirement on the appellants to employ a pilot at all but they were free to do so if they chose. They further submitted that the respondent (the pilot) and the crew of the "Mantetsu Maru" were fellow servants of the appellants engaged in common employment upon a common work.

For the respondent it was argued that the doctrine of common employment did not apply because

(a) the employment of the respondent was of a compulsory nature; and

(b) the respondent and the ship's crew were not engaged in a common work.

In the case of *Smith v. Steele*[9] relied on by the respondent it was held that there was no implied contract between the owners of a ship and a pilot whom they are compelled to employ, that the pilot shall take upon himself the risk of injury from the negligence of the shipowners' servants; and that an action will lie by the pilot against the shipowners for injuries caused to him, whilst acting as pilot on board their vessel, by the negligence of their servants.

In that case there was compulsion on both shipowner and pilot—the pilotage was compulsory. It was submitted by the respondent that the reason for

that decision lies not because of the compulsion on the shipowner but because of the compulsion on the pilot.

Counsel for the respondent also referred us to *Tozeland v. West Ham Union*[8] which he described as a logical descendant of and constituted, in his submission, approval for *Smith v. Steele*[9], *supra.*

In *Tozeland's case*[8] an inmate of a poorhouse was put to work with an employee of the Board of Guardians and was injured by his negligence. It was held that the defence of common employment afforded no answer to the action for the plaintiff as a pauper inmate was compelled to obey the order to assist in the work and could not be held to have taken upon himself the risk of injury from the negligence of the defendants' servants.

As Mr. Justice Darling pointed out, at page 531, there was no common employment for there was no contract with the guardians at all.

There was no contract of service in *Tozeland's* case; there was no relationship of employer and employee in any real sense at all.

In the view I take both these cases are distinguishable from the present.

The appellants contended that compulsory pilotage means compulsion on the ship and not on the pilot. That compulsory pilotage has nothing to do with the statutory provisions as to what a pilot is compelled to do. They maintain there is no compulsory pilotage in Singapore but that there is absolute freedom of contract.

Counsel for the appellants relied on *Thom v. J. & P. Hutchingson Ltd.*[15] and *Kelley v. Shamrock Shipping Co. Ltd.*[14]. He also referred us to *Alexander v. Tredegar Iron & Coal Co. Ltd.*[6] [11], *Kelly v. Spenser*[16] and *Powell v. Docks & Inland Waterways Executive*[12]. These latter cases dealt with labourers allocated to employers under a Government scheme.

It was held in those cases that where the workman had been directed into or retained in his employment under the war-time statutory works orders and schemes then in force that did not exclude the normal relationship of master and servant. Those decisions appear to me to be in point.

In the case of *Alexander v. Tredegar Iron & Coal Co. Ltd.*[6], *supra* it was pointed out by Lord Justice Goddard in delivering the judgment of himself and Lord Justice du Parc at page 395 that it would only be possible in that case to escape from the rule of common employment were it to be held that the essential works order in question destroyed the contract of service. The order imposed certain restrictions and conditions on the contract. It made it an offence for a man to refuse to enter into a contract of service with an employer to whom he was directed or for an employer to refuse to employ a man whom he was directed to employ. Equally it was made an offence for a man to leave his employment, or, with certain exceptions, for an employer to discharge him without the permission of an official of the Ministry of Labour, but once a workman was working for an employer he must be considered as working under a contract of service and the ordinary terms of such a contract must apply thereto except in so far as they were abrogated by the order.

The view was expressed in the course of the judgment that it was immaterial whether the men who were killed or injured were in the service of the Tredegar Iron & Coal Company before or after the order came into force but the House of Lords by whom the case was ultimately considered left open this question.

In *Powell v. Docks & Inland Waterways Executive*[12], *supra* Lord Justice Singleton refers in some detail to *Alexander's case supra* and agrees with the view of Lord Justices Goddard and du Parc in that case.

In the case of *Thom v. J. & P. Hutchingson Ltd.*[15], *supra,* the representatives of a ship's engineer who was drowned by reason of the negligent navigation by a pilot in a compulsory pilotage area claimed damages from the owners. Lord President Clyde, in that case, referred to the difficulty of defining with precision the exact legal conditions under which a licensed pilot performed his duties but it was impossible to conceive of him in relation to those duties as other than a constituent member for the time being of the organisation composed of the officers and the crew. He went on to say that if the pilot in that case was voluntarily employed by the owners as their servant, why was not the engineer who lost his life in the accident (said to have been caused by the pilot's fault) his fellow servant? They were engaged in the common work of navigating the ship under a common employment. After the hearing of this appeal had been concluded Mr. Gould drew our attention to the case of *Workington Harbour. and Dock Board v. Towerfield*[17] where, at page 145, Lord Normand agreed with the decision and with the reasoning of the learned Judges in *Thom v. J. & P. Hutchingson Ltd.*[15], *supra.*

In the present case if the pilot (the respondent) was voluntarily employed by the appellants as their servant, as, in my view, he was, why were not those of the crew who attended to the gangway on which he was boarding the ship his fellow servants. In my opinion

they were. There was a nexus between them and the pilot. They were both so it seems to me, engaged in the common work of enabling the ship to get underway. That the pilot was only a temporary member of the ship's company is immaterial because his employment was one of the common incidents of the voyage.

I have carefully examined the authorities to which our attention has been invited and I have come to the conclusion that the respondent was the servant of the appellants engaged in common employment with the crew of the "Mantetsu Maru" on a common work.

The respondent was not, in my opinion, employed under compulsion of law so as to destroy the contract of service between Master and Servant and the defence of common employment raised by the appellants therefore must succeed.

The appeal must be allowed.

Appeal allowed.

Solicitors for the appellants: *Rodyk & Davidson.*

Solicitors for the respondent: *Drew & Napier.*

YAP YOON LIN v. REGINA.

[A. Cr. J. (Spenser Wilkinson, J.) January 22, 1954]

[Penang — Criminal Appeal No. 39 of 1953]

Customs Ordinance, No. 42 of 1952, s. 131 — Charge of carrying uncustomed goods — Meaning of uncustomed goods.

In this case the accused was driving a car from Penang to Ipoh. At the Customs Examination Shed, Butterworth he was asked whether he had uncustomed goods to declare. The car was later brought to the Examination shed and there 96 dozens playing cards were found. The accused was convicted of being knowingly concerned in carrying uncustomed goods and the car in which the goods were being carried was ordered to be forfeited and from this conviction and order of forfeiture of the car he appealed.

Held: (1) the goods were not uncustomed goods as defined by the Ordinance and the appellant was therefore wrongly convicted of being knowingly concerned in carrying uncustomed goods; (2) on the facts the learned Magistrate could have convicted the appellant for failing to make a declaration of dutiable goods under section 129(1) paragraph (e) of the Customs Ordinance and the conviction should therefore be altered accordingly; (3) the order for forfeiture could not stand under the altered conviction under section 129(1) and therefore it was set aside.

Case referred to:—

(1) *Public Prosecutor v. Leong Yoon Meow* noted in (1953) M.L.J. xxxvi.

CRIMINAL APPEAL.

F. G. Pooley for appellant.

J. D. Peterkin, (Federal Counsel) for respondent.

Cur. Adv. Vult.

Spenser Wilkinson, J.: — The appellant was charged jointly with one Vun Ah Sum in the Sessions Court as follows:—

"That you Yap Yoon Lin and Vun Ah Sum alias Voon Kee Sam on 7.10.53 at about 6.30 p.m. at the Customs Examination Shed, Butterworth, P.W. were knowingly concerned in conveying uncustomed goods, to wit, 96 dozens Caravan playing cards, with intent to defraud the Government of Customs duty thereon amounting to $460.80 and you have thereby committed an offence under section 131(1)(e) of the Customs Ordinance No. 42/52 and punishable under section 131 (1)(i) of the same Ordinance."

Upon this charge he was convicted and fined $3,000 and an order was also made confiscating the motor car in which the goods were carried.

The appellant had borrowed the motor car referred to from his uncle in order to go to Ipoh. On the 7th October, 1953 the appellant left Penang in his uncle's car in which, distributed between the back seat of the car and luggage boot, were some boxes containing tooth brushes and a number of packages containing playing cards and two pieces of mackintosh. In the car with the appellant was Vun Ah Sum the 2nd accused, who was acquitted in the Court below, and whose presence in the car is not material to this appeal. The appellant himself drove the car.

On arrival at the Customs barrier in Butterworth a Customs Officer, P.W. 2 asked the appellant if he had any dutiable goods. As a result of what then passed between P.W. 2 and the appellant the appellant got out of the car, took the two mackintoshes to the counter and paid duty on them amounting to $4. This is said to have taken him about ten minutes, and when the appellant returned to the car P.W. 2 asked him whether he had any other dutiable goods. In reply the appellant opened one of the packages of tooth brushes and asked if they were dutiable. He was told that they were not. By this time another ferry was approaching and as there were many packages in the car, the boot being full and the goods piled up to the level of the windows at the back of the car P.W. 2 directed the appellant to take the car to the Examination Shed for further inspection of the goods. There in reply to questions by other Customs Officers (P.W. 3 and P.W. 4) the appellant said he had "budak budak main main punya barang", which the Customs Officers, I think quite rightly, took to mean toys. Upon further inspection of the parcels in the car the Customs Officers in the Shed found the 96 dozens playing cards, the subject matter of the charge.

The appellant in a statement from the dock in the Court below stated that he had told P.W. 2 that he had in the car "main main punya barang". P.W. 2